UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1293

TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 98 PENSION PLAN,

Appellant

v.

AETNA CASUALTY & SURETY COMPANY,

Defendants/Third-Party Plaintiff

v.

LAURENCE E. BACCINI,

Third-Party Defendant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 97-cv-07407
(Honorable Jay C. Waldman)

Argued February 8, 2000

Before SLOVITER, SCIRICA and McKEE, *Circuit Judges*

(Filed: June 13, 2000)

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MEMORANDUM OPINION

SCIRICA, *Circuit Judge.*

In December 1997, the Trustees of the International Brotherhood of Electrical Workers Local 98 Pension Plan ("Trustees") filed a complaint against Aetna Casualty and Surety Company ("Aetna"). The Trustees alleged Aetna breached its contract and engaged in bad faith when it purportedly failed to defend an ERISA suit brought by the Department of Labor in October 1988, and subsequently refused to pay the fees of Trustees' independent counsel.[1] The District Court dismissed the action on the pleadings under Fed. R. Civ. P. 12(c), holding Pennsylvania's four-year statute

1. Count I of the complaint alleged breach of contract, and Count II alleged, in the alternative, a quantum meruit theory for recovery of attorney's fees. Count III of the complaint alleged violation of 42 Pa.C.S. § 8371 for bad faith failure to provide a proper defense. The District Court dismissed Count II holding quantum meruit recovery is not available where there is a written contract covering the subject on which recovery is sought. *Matter of Penn Cent. Trans. Co.*, 831 F.2d 1221, 1230 (3d Cir. 1987). The Trustees do not challenge this holding on appeal, and we will not address it further.

of limitations on the breach of contract claim had run, and 42 Pa.C.S. § 8371, enacted in 1990, does not apply retroactively to acts of bad faith.

On appeal, the Trustees contend the District Court erred in finding the statute of limitations had begun to run prior to settlement of the underlying ERISA litigation. They argue Aetna continuously breached its duty to defend by appointing incompetent and conflicted counsel, In addition, the Trustees argue the "no action" clause contained in the coverage contract precluded them from bringing suit prior to the conclusion of the ERISA litigation. The Trustees also contend the District Court erred in holding 42 Pa.C.S. § 8371 does not apply retroactively to their bad faith claim, arguing as they do with the breach of contract claim, that Aetna engaged in continuing acts of bad faith after 1990. For the reasons stated, we will affirm the judgment of the District Court.

I.

The U.S. Department of Labor sued the Trustees in October 1988 for alleged breach of fiduciary obligations under ERISA. The Trustees notified Aetna immediately. Five months later, Aetna agreed to defend the suit, but did so under a reservation of rights, and strongly suggested the Trustees retain their own counsel.

On April 5, 1989, Aetna selected counsel to defend the ERISA suit. The Trustees claim Aetna's selected counsel was inexperienced and had a clear conflict of interest in representing both the Trustees and Aetna, which was still in the process of deciding coverage. The Trustees further claim Aetna did nothing during the eight years the DOL suit was pending to investigate the propriety of its reservation of rights, and never issued a final coverage notice to the Trustees.

The Trustees' own counsel continued to represent them in the DOL suit, which ultimately settled on May 1, 1996. The Trustees sought reimbursement from Aetna for attorney's fees

and costs.[2] Aetna refused, although it did agree to pay $140,000 in connection with the settlement.[3]

II.

The District Court had diversity jurisdiction under 28 U.S.C. § 1332(a), and we have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's dismissal on a 12(c) motion, *Jablonski v. Pan Am. World Airways. Inc.*, 863 F.2d 289, 290 (3d Cir. 1988), and will affirm if, reading all facts and inferences in the light most favorable to the plaintiffs, the defendant has demonstrated it is entitled to judgment as a matter of law, *Hayes v. Community Gen. Osteopathic Hosp.*, 940 F.2d 54, 56 (3d Cir. 1991).

III.

A.

We do not need to decide whether Aetna had a duty to defend the Trustees in this case;[4] the District Court correctly assumed, for purposes of the 12(c) motion, that the Trustees pled sufficient facts to establish both the obligation to defend and the breach of the obligation. Instead the issue is whether the breach as alleged in the complaint occurred more than four years prior to filing.[5]

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2. In their complaint, the Trustees sought in excess of $100,000 from Aetna, claiming that the "Fund incurred hundreds of thousands of dollars in legal expenses."

3. The total settlement amount from all defendants was $170,000, of which the Trustees were obligated to pay $140,000. The DOL's initial demand was for $1.7 million.

4. *See American Contract Bridge League v. Nationwide Mut. Fire Ins. Co.*, 752 F.2d 71, 75 (3d Cir. 1985) (holding it is well established under Pennsylvania law that, in exchange for payment of premium, an insurer becomes contractually obligated to defend its insured).

5. Aetna contends the Trustees argued before the District Court only that the "no action" clause tolled the running of the statute of limitations, and did not argue the limitations period did not begin prior to termination of the ERISA litigation. Aetna argues, therefore, we should not consider this issue, as it was not first raised in the District Court. But the District Court gave careful consideration to when the alleged breaches occurred in

The statute of limitations in a breach of contract claim begins to run when the right to bring suit first arises. *See Centre Concrete Co. v. AGI, Inc.*, 559 A.2d 516, 518 (Pa. 1989). The District Court identified the following as the alleged breaches of contract: the failure to promptly appoint counsel to defend the ERISA suit during the first five months the underlying litigation was pending from late 1988 through early 1989; the appointment of allegedly inexperienced and incompetent counsel in 1989; and the refusal to pay the Trustees' attorneys fees, which was communicated to the Trustees in a letter dated April 5, 1989. The Trustees argue Aetna's duty to defend continued throughout the litigation, and its purported failure to do so constituted an ongoing breach through settlement.

The Trustees cite to *UTI Corp. v. Fireman's Fund Ins. Co.*, 896 F. Supp. 362 (D.N.J. 1995) and *Moffat v. Metropolitan Cas. Ins. Co. of New York*, 238 F. Supp. 165 (M.D. Pa. 1964) in support of its argument that Aetna's actions constituted an ongoing breach. But *UTI Corp.* and *Moffat* are both distinguishable in that they address situations where the insurance company refused to defend the underlying suit, despite its obligation to do so. Here, Aetna did not refuse to defend, but instead selected counsel that the Trustees found inadequate. Therefore, we agree with the District Court in its finding that the "breach" occurred at the time counsel was selected, or at the time the Trustees recognized selected counsel's inexperience and inability to adequately defend the suit. While the District Court did not fix a date on which the breach occurred, it held the breach must have become apparent to the Trustees more than four years prior to the filing of suit on December 5, 1997.

The Trustees contend the District Court erred in holding that the alleged breaches all occurred more than four years before filing suit, and to the extent their complaint was flawed in failing to allege an ongoing breach, the District Court should have granted them leave to amend. But their brief on

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determining whether the statute of limitations required dismissal. Therefore, we find this issue is properly before us.

appeal points to no additional evidence or allegation amounting to a contract breach that occurred within the four year statutory period.[6] Aetna selected counsel in April 1989. At that time it informed the Trustees that it was doing so under a reservation of rights, and advised the Trustees to retain independent counsel. At that time, if not shortly thereafter, the Trustees should have been aware of selected counsel's experience, and of any potential conflict of interest. Aetna's failure to issue a final declaration of coverage does not create a new conflict, or amount to a new breach of its duty to defend occurring within the statutory period. Furthermore, Aetna informed the Trustees' independent counsel in May 1989 that it would not pay for his services. We agree with the District Court that all alleged breaches of contract occurred, or became apparent, more than four years before filing. Therefore the statute of limitations bars recovery from Aetna.

The Trustees also contend the "no action" clause in the insurance contract prohibited them from filing suit against Aetna prior to settlement. *See UTI Corp. v. Fireman's Fund Ins. Co.*, 896 F. Supp. 362 (D.N.J. 1995).[7] The "no action" clause provides:

> No action shall lie against [Aetna] unless, as a condition precedent thereto, . . . the amount of the Insured's obligation to pay shall have been finally determined either by

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6. Specifically, the Trustees argue: Aetna chose inexperienced counsel and failed to appoint more knowledgeable counsel when the need for such a change became obvious; Aetna purposefully minimized the involvement of chosen counsel in order to contain its costs; Aetna improperly utilized its chosen counsel to obtain, and give to Aetna, information Aetna could use to disclaim coverage; Aetna intentionally concealed the dual role Aetna's chosen counsel was playing, which created a conflict that worked to the detriment of the Trustees; and Aetna did nothing to investigate the propriety of its initial reservation of rights, forcing the Trustees to continue to utilize their own counsel. *See* App. Br. at 26.

7. As with the *Moffat* decision cited to by the Trustees, *UTI Corp.* is distinguishable from this case in that it involves an insurance company's refusal to defend and to indemnify, whereas here, Aetna both defended and indemnified.

> judgment against the insured after actual trial or by written agreement of the Insured, the claimant and the Company.

The District Court held the "no action" clause was aimed essentially at third party claimants, not the insured and did not bar the Trustees from filing suit or toll the statute of limitations. We agree.[8]

In *Eureka Fed. Sav. & Loan Ass'n v. American Cas. Co. of Reading, Pa.*, 873 F.2d 229, 233 (9th Cir. 1989), the Court of Appeals for the Ninth Circuit held "no action" clauses do not bar actions by the insured to adjudicate issues of coverage and defense. Citing goals identical to those we discussed in *Apalucci v. Agora Syndicate. Inc.*, 145 F.3d 630 (3d Cir. 1998) (holding the "no action" was unenforceable against an insured when the insured had breached its duty to defend),[9] the Court concluded that the "no action" clause did not bar an action by the insured for a declaratory judgment on liability limits, but instead was directed at third parties. The Court of Appeals for the Tenth Circuit has held that "no action" clauses apply to third parties, and do not apply to a suit brought by an insured against the insurer for breach of its duty to defend. *See Paul Holt Drilling. Inc. v. Liberty Mut. Ins. Co.*, 664 F.2d 252, 254 (10th Cir. 1981) (interpreting Oklahoma law). In *Cardin v. Pacific Employers Ins. Co.*, 745 F. Supp. 330, 335 (D.Md. 1990), the court held that because the "no action" clause did

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8. No action clauses in insurance policies are designed to prevent the insurer from having to defend claims it views as outside the scope of policy coverage as well as to prevent juries from realizing that the insurer is available as a potential deep pocket for compensating an injured claimant. Through the no action clause, the insurer also hopes to avoid having to fund a defense (or worse yet payment) to the uncovered claim if it is brought by the third party directly.

Jeffrey Stempel, *Law of Insurance Contract Disputes*, 2d Ed., § 9.14 (1999).

9. Those goals are to prevent: actions against the insurer for money judgment by the injured party until damages have been fixed by final judgment or agreed settlement; nuisance suits against the insurance company; and an injured party or an insured from bringing the insurance company into the underlying litigation with possible resultant prejudice. *Apalucci*, 145 F.3d at 633 (citations omitted); *Eureka Fed. Sav. & Loan Ass'n*, 873 F.2d at 233.

not prevent the insured from seeking a declaratory judgment at the time the insurer denied plaintiffs' request to be defended by counsel of choice, it similarly did not toll the running of the statute of limitations.[10] The Trustees have cited to no authority, nor have we found any, that would lead us to believe that the Pennsylvania courts would reach a different conclusion.

B.

The Trustees also contend the District Court erred in dismissing their claim for bad faith under 42 Pa.C.S.A. § 8371, enacted in 1990, holding that it did not apply retroactively to bad faith acts committed prior to 1990. The Trustees maintain they pled Aetna committed bad faith acts before and after 1990. But the District Court held the alleged post-1990 bad faith acts the Trustees pled were part and parcel of the alleged pre-1990 bad faith, and were not subject to the statute.

The Pennsylvania Superior Court recently addressed this issue in *Adamski v. Allstate Ins. Co.,* 738 A.2d 1033 (Pa. Super. 1999), holding:

> [W]e find that appellants have alleged no separate acts of bad faith conduct occurring after the effective date of section 8371 or within the statute of limitations applicable to any viable claim of common law bad faith. Instead, appellant's allegations relate to conduct that merely reaffirmed the position appellee clearly set forth in the letter of April 2, 1986. (Citation omitted.) It is hornbook law that a statute of limitations begins to run as soon as the right to institute suit arises. *Centre Concrete Co. v. AGI, Inc.,* 522 Pa. 27, 559 A.2d 516 (1989). This is true regard-

10. Specifically, the Court held:

> In sum, Cardin's cause of action in this case is time-barred. Cardin clearly was entitled to sue on the date he learned that Pacific would not pay Williams & Connolly's fees in defending him, despite the presence of the no-action clause in his insurance contract. Because Cardin was entitled to sue as of the end of October 1985, this suit, filed over three years later on September 5, 1989, is barred by the statute of limitations.

> less of whether the full extent of harm is known when the action arises. (Citations omitted.)

Id. at 1042. In *Adamski,* the court found the alleged acts of bad faith to be: failure to defend or indemnify the plaintiff; denial of liability protection, a defense, and indemnity without first seeking a declaratory judgment; failure to settle or compromise appellant's claim; lack of an adequate basis for denying protection, a defense and indemnity; and failure to conduct a diligent investigation. *Id.* at 1038. Here, the District Court summarized the Trustees allegations of bad faith as: Aetna's delay in appointing counsel; Aetna's appointment of allegedly inexperienced and incapable counsel; and Aetna's refusal to pay fees of the Trustees' counsel, a decision Aetna communicated to the Trustees in a letter dated May 10, 1989.

The Trustees contend they pled acts of bad faith that continued throughout the underlying litigation. But they fail to identify any act occurring after 1990 that did not arise out of the initial alleged acts of bad faith, Instead they argue that Aetna acted in bad faith by failing to investigate properly the coverage question for eight years, and by interfering in the defense throughout the litigation. We agree with the District Court's finding that the Trustees are arguing a theory of continuing violation, rather than independent bad acts occurring during the course of litigation. Therefore the post-1990 acts are not covered by Pennsylvania's bad faith statute. *See id. See also American Int'l Underwriters Corp. v. Zurn Indus. Inc.,* 771 F. Supp. 690, 703 (W.D.Pa. 199 1).[11]

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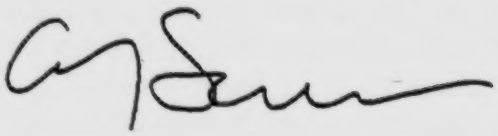
11. The Trustees argue that the District Court should have granted them leave to amend their complaint to specify acts of bad faith occurring after July 1, 1990. *See Lombardo v. State Farm Mutual Auto. Ins. Co.,* 800 F. Supp. 208, 214 (E.D.Pa. 1992) (holding that the permissive standards of a 12(c) motion require the court to grant leave to amend, finding it "impossible to tell from the complaint whether the defendant committed any independent acts of bad faith" after 1990). But here, as with their breach of contract claim, the Trustees pled in their complaint acts which occurred or continued to occur after the enabling date of the bad faith statute. We agree with the District Court's conclusion that these acts, and all others asserted in the appeal brief, arose out of the initial acts of bad faith, and are not independent acts. We therefore see no reason why the District Court should have granted leave to amend.

IV.

For the foregoing reasons, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing opinion.



Circuit Judge

DATED: JUN 13 2000

UNITED STATES COURT OF APPEALS
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BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL 98 PENSION PLAN,

Appellant

v.

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(Honorable Jay C. Waldman)

Argued February 8, 2000

Before: SLOVITER, SCIRICA and McKEE, *Circuit Judges*

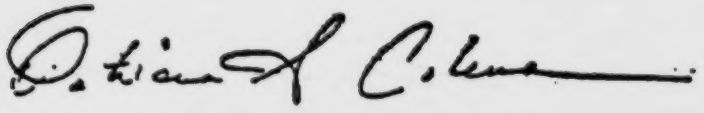
JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on February 8, 2000. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this court that the judgment of the District Court entered March 5, 1999, be, and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:



Acting Clerk

DATED: June 13, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 98 PENSION PLAN,	:	CIVIL ACTION
v.	:	
AETNA CASUALTY & SURETY COMPANY,	:	
v.	:	
LAURANCE E. BACCINI, ESQ.	:	NO. 97-7407

MEMORANDUM

WALDMAN, J. March 5, 1999

I. Introduction

Plaintiffs háve asserted claims against their former insurer for breach of a contractual obligation to provide a defense in underlying litigation, to recoup funds paid to their own attorney on a quantum merit theory and under 42 Pa. C.S.A. § 8371 for a bad faith failure to provide a proper defense. The defendant insurer joined the attorney plaintiffs engaged in the underlying litigation as a third-party defendant and asserted claims against him for indemnification, contribution and tortious interference with contractual relations. Presently before the court is defendant's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c)

II. Legal Standard

A motion for judgment on the pleadings is most practically employed by a defendant who asserts entitlement to judgment based on a statute of limitations or other waivable defense in light of the plaintiff's allegations. The standard for deciding such a motion is the same as that for a motion to dismiss for failure to state a claim. *See Grindstaff v. Green,* 133 F.3d 416, 421 (6th Cir. 1998); *Jubilee v. Horn,* 975 F. Supp. 761, 763 (E.D. Pa. 1997), *aff'd,* 151 F.3d 1025 (3d Cir. 1998). Such a motion thus tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. *See Markowitz v. Northeast Land Co.,* 906 F.2d 100, 103 (3d Cir. 1990); *Sturm v. Clark,* 835 F.2d 1009, 1011 (3d Cir. 1987).

The court considers the pleadings, any appended exhibits and matters of public record, assumes to be true the plaintiff's factual allegations, draws all reasonable inferences in favor of the plaintiff and determines whether the plaintiff may be able to prove any set of facts to support his claim which would entitle him to relief. *See Oshiver v. Levin, Fishbein, Sedran & Berman,* 39 F.3d 1380, 1384 & n.2 (3d Cir. 1994); *Rocks v. Philadelphia,* 868 F.2d 644, 645 (3d Cir. 1989). A claim will be precluded when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. *See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc.,* 836 F.2d 173, 179 (3d Cir. 1988).

III. Facts

The pertinent factual allegations are as follow.

On May 1, 1996 the Trustees of the International Brotherhood of Electrical Workers Local 98 Pension Plan ("the Trustees") reached a settlement with the United States Department of Labor ("DOL") which terminated litigation initiated by the DOL in October 1988. The DOL had charged that the Trustees then serving had violated their fiduciary duties under ERISA by engaging in a prohibited loan transaction. Defendant Aetna then insured the Plan and its Trustees.

Aetna paid $140,000 in connection with the settlement.[1] The Plan's current Trustees filed this suit to recover from Aetna the money expended by the former Trustees to compensate their counsel for work in the prior DOL litigation.

During the first five months that the underlying litigation was pending, Aetna failed to appoint counsel to represent the Trustees. As a result, the Trustees incurred "substantial legal expenses" for representation by their attorney, third-party defendant Laurance Baccini.

While reserving its rights under the policy, on April 5, 1989 Aetna engaged the Philadelphia firm of Blackburn, Michelman & Tyndall to defend the Trustees in the DOL suit. The Blackburn firm "lacked any competence to litigate ERISA claims" and "assigned their least experienced" associate to the case. The firm "represented Aetna in other matters" and thus was conflicted. Rather than "zealously represent the former trustees," the Blackburn firm "sought solely to advance the interests" of defendant Aetna. The "Blackburn firm failed to participate meaningfully in the case and made no substantive contributions to the defense of the case."

To ensure effective representation, the former Trustees utilized the services of their own attorney, Mr. Baccini. Mr. Baccini ultimately obtained a "very favorable" settlement of the DOL litigation.

As early as May 10, 1989, Aetna advised Mr. Baccini by letter that defense costs incurred and any future defense costs for his services would not be paid by Aetna and would be "the responsibility of the trust fund" Aetna thereafter failed to pay or reimburse plaintiffs for the cost of Mr. Baccini's services. As a result, the Trustees expended "hundreds of thousands of dollars" in the defense of the underlying litigation which they have never recovered.

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1. The Aetna policy provided fiduciary responsibility coverage of $5,000,000. The DOL sought the restoration to the Plan of the unpaid balance of an $800,000 loan. *See Dole v. Compton*, 753 F. Supp. 563, 565 (E.D. Pa. 1990).

IV. Discussion

A. Contract Claim

Aetna's contentions that it fulfilled the contractual obligation it purportedly breached when it admittedly engaged counsel to defend the Trustees and that it is not liable for the professionally deficient performance of appointed counsel are correct to an extent. Ordinarily, an insured's recourse for legal malpractice or other breach of professional responsibilities by a defending attorney would be against the attorney and not the insurer which engaged him to provide a defense. *See Ingersoll-Rand Equipment Corp. v. Transp. Ins. Co.*, 963 F. Supp. 452, 454 (M.D. Pa. 1997).[2]

It fairly appears from plaintiffs' allegations, however, that their contract claim is not based solely on their appointed counsel's conduct but on Aetna's conduct in retaining them. Absent a contractual right to select or to veto the selection of counsel, an insured must generally accept and work with counsel appointed by the insurer. Further, an insurer is not required to oversee and evaluate the professional performance of appointed counsel at every turn in the litigation. On the other hand, the right to a defense fairly contemplates the appointment of counsel able and willing actively to provide representation. An insurer has a duty to exercise due care in defending a claim against an insured. *See Ingersoll-Rand Equipment Corp.*, 963 F. Supp. at 455; *Builders Square Inc. v. Scirocco*, 1997 WL 3205, *6 (E.D. Pa. Jan 7, 1997), *aff'd*, 135 F.3d 763 (3d Cir. 1997). Accepting plaintiffs' allegations as true, one could reasonably infer that Aetna breached its duty by appointing evidently unqualified counsel who failed to provide any meaningful representation.[3]

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2. When counsel is retained by an insurer to defend an insured, the client is the insured and counsel is obligated to act exclusively in the insured's best interests. *Point Pleasant Canoe Rental, Inc., v. Tinicum Twp.*, 110 F.R.D. 166, 170 (E.D. Pa. 1986).

3. In fairness to the Blackburn firm, it is noted that Aetna avers that to the extent the firm did not participate effectively in the DOL litigation this was because counsel engaged by the Trustees "interfered with, hindered and impeded" its ability to do so. In considering a motion for judgment on

More forceful is Aetna's argument that plaintiffs' contract claim is barred by the statute of limitations. The statute of limitations for contract claims under Pennsylvania law is four years. *See* 42 Pa. C.S.A. § 5525. The statute of limitations begins to run at the time a right of action accrues, that is, as soon as the right to institute a suit arises. *Centre Concrete Co. v. AGI, Inc.*, 559 A.2d 516, 518 (Pa. 1989). A claim accrues when the plaintiff is damaged and not when the precise amount or extent of damages is determined. *Liberty Bank v. Ruder*, 587 A-2d 761, 765 (Pa. Super. 1991); *Manzi v. H.K. Porter Co.*, 587 A.2d 778, 779-80 (Pa. Super. 1991), *app. denied*, 607 A.2d 254 (Pa. 1992); *Pashak v. Barish*, 450 A.2d 67, 69 (Pa. Super. 1982). Because the Trustees assert that Aetna breached its contract when it failed promptly to appoint counsel in 1988 and then engaged inadequate counsel in 1989, Aetna argues that a contract claim asserted in December 1997 is untimely.

Plaintiffs respond that they were contractually barred from filing suit until the termination of the DOL litigation by virtue of a "no action" clause in the insurance contract. The "no action" clause provided in pertinent that no action could be asserted against Aetna "until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy."

As the language itself suggests, such a "no action" provision is essentially aimed at suits by third-party claimants. The principal purposes of such provisions are to prevent a suit by a third-party claimant for a monetary judgment against the insurer before damages are fixed and to prevent the litigants from joining the insurer as a party in the underlying action. *See Apalucci v. Agora Syndicate, Inc.*, 145 F.3d 630, 633 (3d

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the pleadings, however, the court necessarily assumes that plaintiffs' factual allegations are true.

Cir. 1998). Such a provision does not preclude a suit by an insured against an insurer who has breached its contractual obligation to provide a defense to the insured. *Id.* at 634. *See also Eureka Fed. Sav. & Loan Ass'n v. American Casualty Co. of Reading, Pa.*, 873 F.2d 229, 233 (9th Cir. 1989) ("no action" clauses do not bar actions by insureds to adjudicate issues of coverage and defense); *Cardin v. Pacific Employers Insurance Co.*, 745 F. Supp. 330, 334 (D. Md. 1990) (statute of limitations begins to run when insurer first communicates to insured dissatisfied with appointed counsel that it will not pay fees of preferred counsel engaged by insured and not at termination of underlying litigation despite presence of "no action" clause).

It is clear from their pleadings that the Trustees knew in 1989 that Aetna had failed diligently to appoint counsel during the first five months of the pendency of the DOL litigation. Presumably, the Blackburn firm did not become less competent and less experienced in handling ERISA claims after its appointment by Aetna in April 1989. If, as plaintiffs allege, the Blackburn firm did nothing substantive to defend the DOL case and never participated in the case in any meaningful way, this was clearly apparently before December 4, 1993, four years and a day prior to the filing of this action. Thus, the Trustees clearly knew over four years before initiating suit that Aetna had breached its obligation to provide a meaningful defense. Plaintiffs' contract claim is time-barred.

B. Quantum Meruit Claim

Quantum meruit is an equitable, quasi-contractual remedy by which a contract is implied in law under a theory of unjust enrichment. *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 998 (3d Cir. 1987). The claimant must show that the party against whom recovery is sought wrongfully secured or passively received a benefit which it would be unconscionable for the party to retain without compensating the provider. *Id.* at 999.

A quantum meruit recovery is not possible if there is a written contract that covers the subject as to which recovery is sought. *See Matter of Penn Central Trans. Co.*, 831 F.2d 1221, 1230 (3d Cir. 1987); *Refac Financial Corp. v. Patlex Corp.*, 912 F. Supp. 159, 162 (E.D. Pa. 1996); *J & L Assoc., Inc. v. Philadelphia Housing Auth.*, 1993 WL 349438, *6 (E.D. Pa. Sept. 10, 1993); *McClellan Realty Corp. v. Institutional Investors Trust*, 714 F. Supp. 733, 739 (M.D. Pa. 1988), *aff'd*, 879 F.2d 858 (3d Cir. 1989); *Schott v. Westinghouse Electric Corp.*, 259 A.2d 443, 448 (Pa. 1969). The parties' insurance contract obligated Aetna to provide the Trustees with a legal defense in the underlying litigation.

C. Statutory Bad-Faith Claim

42 Pa. C.S.A. § 8371 does not define "bad faith." Most § 8371 claims involve the failure of an insurer to pay the proceeds of a policy. The statute on its face, however, applies to any form of bad faith conduct by an insurer towards an insured relating to an action arising under an insurance policy. *See Argonaut Ins. Co. v. HGO, Inc.*, 1996 WL 433564, *4 (E.D. Pa. July 25, 1996); *Rottmund v. Continental Assu. Co.*, 813 F. Supp. 1104, 1108-11 (E.D. Pa. 1992). Negligence or bad judgment, however, do not constitute bad faith. To establish bad faith, the insured must prove by clear and convincing evidence that the insurer knowingly or recklessly breached a duty to the insured. *See Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 751 (3d Cir. 1994). One could reasonably infer from plaintiffs' pleadings that Aetna knowingly or recklessly breached its duty to provide the Trustees with a defense when it failed to appoint counsel during the first five months of the DOL

litigation and then engaged counsel with no competence to litigate ERISA claims and who were incapable of providing adequate representation.

Section 8371, however, does not apply to conduct which occurred before July 1, 1990. Aetna left the Trustees without appointed counsel from November 1988 through March 1989. The appointment of allegedly inexperienced and incapable counsel occurred on April 5, 1989. By May 10, 1989 Aetna had communicated that it would not pay the fees of the Trustees' preferred counsel for prior or future services. It appears that true to its word, Aetna did not pay for services rendered by Mr. Baccini into the spring of 1996. Courts, however, have rejected attempts to impose liability under § 8371 for conduct before July 1, 1990 on a "continuing violation" theory. Thus, while an insurer may be liable under § 8371 for an independent act of bad faith committed on or after July 1, 1990, there is no liability for an insurer's reaffirmation on or after July 1, 1990 of bad faith conduct preceding July 1, 1990. *See Rottmund,* 813 F. Supp. at 1106; *Lombardo v. State Farm Mutual Auto Ins. Co.,* 800 F. Supp. 208, 214 (E.D. Pa. 1992); *American Internat'l Underwriters Corp. v. Zurn Industries, Inc.,* 771 F. Supp. 690, 703 (W.D. Pa. 1991).

Plaintiffs have not alleged an independent act of bad faith by Aetna on or after July 1, 1990. Accordingly, there is no liability under § 8371.

IV. Conclusion

Because it appears from their pleadings that plaintiffs have not asserted a timely contract claim or legally viable § 8371 and quantum meruit claims, defendant's motion will be granted. Because all of Aetna's claims against Mr. Baccini are contingent on Aetna's liability to plaintiffs, the third-party claims against Mr. Baccini will be dismissed. An appropriate order will be entered.

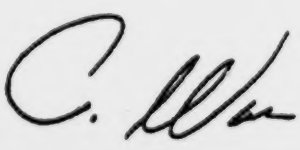
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 98 PENSION PLAN,	:	CIVIL ACTION
v.	:	
AETNA CASUALTY & SURETY COMPANY,	:	
v.	:	
LAURENCE E. BACCINI, ESQ.	:	NO. 97-7407

ORDER

AND NOW, this 5th day of March, 1999, upon consideration of the defendant's Motion for Judgment on the Pleadings (Doc. #10) and plaintiffs' response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT is ENTERED** on the pleadings in the above action for defendant Aetna and against plaintiffs and as all of the claims against third-party defendant Baccini are contingent upon defendant's liability to plaintiffs, defendant Aetna's third-party complaint against Mr. Baccini is **DISMISSED.**

BY THE COURT:



Jay C. Waldman, J.